IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.81 OF 2004

Hindustan Petroleum Corporation Ltd. ... Petitioner.

vs.

M/s.Era Constructions (India) Ltd. & Anr. .... Respondents.

Mr.M.D.Siodia i/b. Rustamji & Ginwala, for Petitioner.

Mr.Arvind Minocha with Ms.Rekha Tawde i/b. M.V.Kini & Co., for Respondents.

CORAM: D.K.DESHMUKH,J.

DATED: 9th August,2005

P.C.:-

1. By this petition, the petitioner challenges the Award made by the sole Arbitrator dated 31st October,2003. The petitioner had given a contract for construction of a building to the respondent no.1. Out of that contract certain disputes arose and the matter was referred to arbitration. The matters that are in dispute before me are as under:-

(i) The petitioner had deducted amount of Rs.16,98,818/- towards penalty for delay in completion of the building. The learned

Arbitrator has held that the petitioner could have levied only Rs.6,79,370/- as penalty, and therefore, has directed the petitioner to refund the amount of Rs.10,46,787/-.

(ii) The Contractor had carried out murrum filling, whereas the contractor was paid for sand filling. The difference in the rate was claimed. The Arbitrator has awarded the amount of Rs.6,65,135/- towards the difference which was subsequently reduced to Rs.5,43,094.07.

(iii) The contractor-Respondent no.1 had claimed the amount for lead of 500 meters and the learned Arbitrator has awarded Rs.94,650/- on that count.

2. So far as the first point is concerned, it is submitted by the petitioner that by letter dated 12.2.2001 written by the Respondent no.1 to the petitioner, the Respondent no.1 had claimed that it has been given some additional work and that so far as the existing work is concerned there are only a few weeks left for completion of that work and therefore, it should be granted extension of that time. That letter was replied to by letter dated 13.3.2001 and considering the request of respondent no.1, time was extended upto 31.3.2001 in relation to the construction of control room. So also time was extended till 23.4.2001 in relation to the construction of Administrative building. These extensions were accepted by the Respondent no.1 by letter dated

14.8.2001. It is further pointed out that by letter dated 12.11.2001 the Respondent no.1 had accepted the completion date and had undertaken not to raise any dispute in relation to the measurement and the date of completion. It is submitted that the learned Arbitrator has held in so far as the control room is concerned that the work was to be completed by 31.3.2001 which was actually completed on 18.4.2001. However, though there was delay of 18 days in completing the work of control room, no damages have been levied by the learned Arbitrator because the work was completed within the overall completion target date 23.4.2001. The administrative building including the first floor was completed on 19.6.2001. However, the time was extended in relation to the administrative building including the first floor upto 23rd April,2001. The Arbitrator however, has held that because the drawings of the building were handed over in November,2000, the Contractor had time upto 7th June,2001 to complete the work of administrative building and therefore, the delay was of 12 days and therefore, the Arbitrator has reduced the amount of penalty. While calculating the amount of penalty, according to the petitioner, the learned Arbitrator has acted contrary to the terms of Contract. According to the terms of contract, the penalty was to be levied at the rate of 2% of the estimated value, whereas the learned Arbitrator has held that the clause in the contract for levying of penalty at the rate of 2% of the estimated value, is contrary to principle of

natural justice and therefore, has permitted levying of penalty at the same rate on the actual value of the contract. The learned Counsel appearing for petitioner submitted that the learned Arbitrator while recording this finding in relation to point no.1 referred to above has ignored the correspondence on record, the stand taken by the Respondent no.1 itself and also the terms of contract. On behalf of the respondent no.1, on the other hand, it is submitted that as per the terms of contract time was upto 7th June,2001 for completion of work, and as the entire work of the control room was completed by 18th April,2001 and in relation to the Administrative building by 19th June,2001, no extension was necessary. The learned Counsel further submits that if the Contractor has to be paid according to the actual value of the contract, there is no justification in taken into consideration the estimated value of the contract for levying the penalty.

3. So far as the second point is concerned, it is submitted on behalf of the petitioner that the contractor has submitted the bills of sand filling and it was accordingly paid for that and therefore, there was no justification for contractor claiming for murrum filling before the learned Arbitrator. It is submitted that in any case without the contractor leading any oral evidence the findings could not have been recorded in relation to the alleged understanding between the parties.

On behalf of the Respondent no.1 it is submitted that in the bills, claim was made for sand filling because of the understanding between the parties though actually murrum was supplied and therefore, the learned Arbitrator was justified in making the Award.

4. So far as the third point is concerned, according to the respondent no.1 after recording the finding that the lead was between 80-100 meters, the learned Arbitrator has awarded the final rate because according to the prevalent Engineering practice anything in excess of 50 meters is to be awarded at the same rate.

5. Now so far as the point no.1 is concerned, it is clear that all the findings recorded by the learned Arbitrator are contrary to the correspondence on record and they have been recorded without considering the stand taken by the petitioner. In the letter dated 12.2.2001 which was admittedly on record, the Respondent no.1 states thus:-

> "However, we have been planning to construct this building with the existing details which shows only one ground floor. Only a few weeks are now left for the completion of this building, whereas a lot of finishing items are involved in this block. At this stage therefore,

> we require 30 days' additional time to complete the first floor also for which time extension may please be allowed."

Thus, on 12.2.2001 the Respondent no.1 had submitted that there are only a few weeks left for it to complete the control room as also the administrative building. Had it been the stand of the Contractor that it is entitled to calculate the time from November,2000 and therefore, it has time upto June,2001 to complete the work, it would not have said that few weeks are left for it to complete the work. The same thing is repeated by the Contractor-Respondent no.1 in the letter dated 24.2.2001. Relying on the representation made by the Contractor-Respondent no.1, the extension was granted by the petitioner in relation to the control room upto 31.3.2001 and in relation to the Administrative building upto 23.4.2001. This extension was accepted by the Contractor by his letter dated 14.8.2001. In the letter dated 12.11.2001 the Contractor stated thus:-

> "We are hereby accepting All measurements and Qty which are entered in Final M.R.R. no.256 dt.10.11.2001. Also we are accepting completion date. There will be no dispute in future for measurement and date of completion."

Thus, the contractor had undertaken not to raise any dispute about the completion date and the contractor had sought extension of time on the assumption that the time for construction of the building was to be over by the end of February,2001. Therefore, it did not lie in the mouth of the contractor that the contractor-Respondent no.1 had time upto June,2001 to complete the work. In any case, I do not find any justification for denying the damages in relation to the control room on the basis of overall completion target date 23rd April,2001. I have not been able to see this term "overall completion target" anywhere in the contract or correspondence. It is further to be seen here that Clause 5 of the Contract provides that in case of delay in completing the work beyond specified completion period, penalty at the rate of 0.5% (half percent) of the total contract value for every week of delay can be levied. The term "Contract Value" is defined by Clause 1 which means the estimated value of the contract. As this was agreed term between the parties, the learned Arbitrator had no jurisdiction to say that this terms is contrary to the principle of natural justice and therefore, damages can be levied only on the basis of actual contract value and not on estimated contract value. The Award made by the learned Arbitrator in this regard is totally without jurisdiction.

6. So far as the second point is concerned, perusal of the

running bill and the final bill submitted by the Contractor-Respondent no.1 show that the Respondent no.1 always claimed for sand filling and it was also paid accordingly. For the first time, the respondent no.1 made the claim that respondent no.1 had actually supplied murrum and therefore, the respondent no.1 is entitled to the rate of murrum filling. The petitioner accepted the supply of murrum by the respondent no.1, but according to the petitioner, the respondent no.1 was permitted to supply murrum on the understanding that it should claim payment only for sand filling, and the respondent no.1 was also paid accordingly. This statement made by the petitioner was substantiated by the bills i.e. running bills and final bill submitted by the respondent no.1 and therefore, to prove that anything else was required to be supplied by the contractor, it was for the contractor to enter into the witness box and to depose to that effect. In the absence of any oral evidence, it was not possible for the Arbitrator to hold that the respondent no.1 had claimed for the rate of sand filling though it had supplied murrum because of some understanding between the petitioner and respondent no.1. The Award made by the learned Arbitrator on that count is clearly liable to be set aside.

7. So far as the third point is concerned, perusal of the Award shows that the Contractor was claiming Rs. 94,650/- on the footing that the lead was of 500 meters. The learned Arbitrator has recorded

findings that the lead was between 80-100 meters, however, while awarding the amount full amount of claim for 500 meters i.e. Rs. 94,650/- has been awarded. I do not see any justification for the learned Arbitrator to make that Award. Thus, the Award made by the learned Arbitrator in relation to the liquidated damages and in relation to the difference between murrum filling and sand filling and the Award made in relation to the lead for mastic material mix, are set aside. The Award is modified accordingly. The petition is disposed of.